No. 1359-71

TIMOTHY J. SISSER,

Petitioner,

v.

SELECTIVE SERVICE LOCAL BOARD NO. 16, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

No. 1359-71

DAVID KARL GUTKNECHT,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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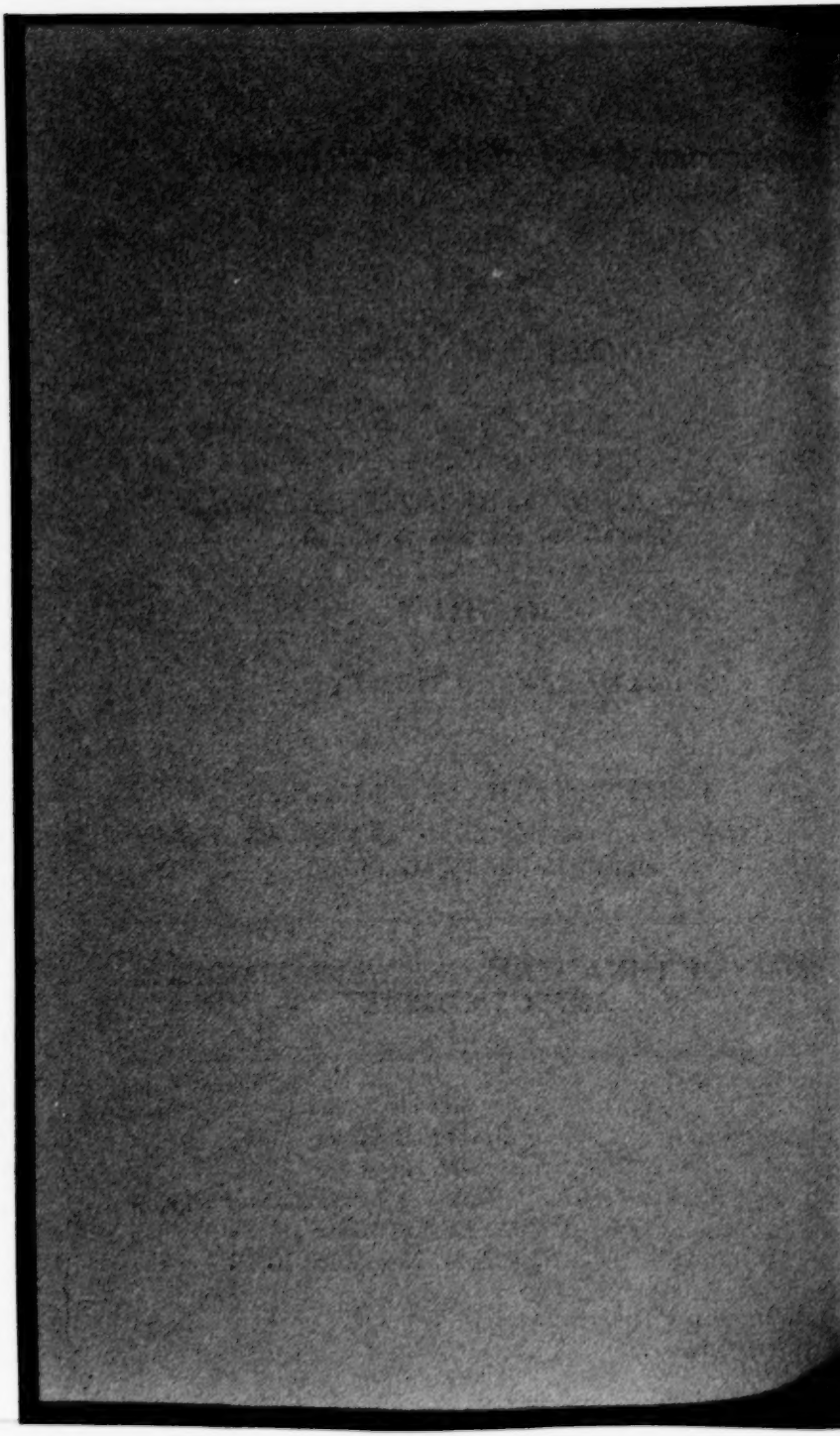

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1144

TIMOTHY J. BREEN,

Petitioner,

v.

SELECTIVE SERVICE LOCAL BOARD NO. 16, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No. 1176

DAVID EARL GUTKNECHT,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

This brief is being filed with the consent of the parties.

Interest of the *Amicus*

The American Jewish Congress is a national organization of American Jews, founded more than 50 years ago to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are especially committed to the preservation of the great freedoms secured by the First Amendment in the conviction that only by maintenance of an open society with opportunities for free expression can we improve and protect our democracy.

Among the freedoms we prize most highly is the right of citizens of this nation to express peaceful public dissent from the policies of our government without exposure to penalty or reprisal of any sort. We are concerned about the treatment of "delinquents" under the Selective Service system, as presently administered, not only because it poses grave questions of abuse of statutory authority and denial of Fifth and Sixth Amendment rights, but most particularly because of its pervasive threat to the free exercise of First Amendment rights by millions of young Americans of draft age. It is to these constitutional issues that this brief is directed.

Preliminary Statement

Both cases present the issue of the validity of the Selective Service "delinquency procedures." Under these procedures, a registrant failing to perform any duty required of him under the provisions of the Selective Service Law or Regulations other than the duty to comply with an in-

duction or equivalent civilian work order may be declared delinquent by his local draft board (32 C.F.R., Secs. 1602.4, 1642.4(a) (1967)). Once having declared a registrant delinquent, a local board may proceed to reclassify the registrant into Class I-A (32 C.F.R., Sec. 1642.12 (1967)). Having done so, the board must order him to report for induction before all others, even before volunteers (32 C.F.R., Secs. 1642.13, 1631.7 (1967)). Local boards are also empowered to remove registrants from delinquency status (32 C.F.R., Sec. 1642.4(c)).

In *Breen* (No. 1144), the petitioner, a full-time undergraduate student, had been deferred from training and service under Section 6(h)(1) of the Military Selective Service Act of 1967, 50 App. U.S.C., Sec. 456(h)(1). However, he was declared delinquent, stripped of his deferment, reclassified I-A and ordered to report for induction after he returned his Selective Service Registration Certificate to the government as a statement of protest against the Vietnam war. Petitioner brought suit seeking a judgment that the declaration of his delinquency was null and void and an injunction against his induction into the armed forces. The District Court held that it was deprived of jurisdiction by Section 10(b)(3) of the 1967 Act (50 App. U.S.C., Sec. 460(b)(3)). The Court of Appeals, though noting its belief that petitioner had asserted substantial constitutional claims, affirmed on the jurisdictional ground.

In *Gutknecht* (No. 1176), petitioner had participated in a "Stop the Draft Week" protest in Minneapolis and had left his Registration Certificate and Notice of Classification I-A on the steps of the Federal Building in that city. These

were sent to the Minnesota Director of Selective Service. Subsequently, petitioner was declared "delinquent" for failing to have his Registration Certificate and Notice of Classification in his possession. Five days later his induction date was advanced pursuant to C.F.R. 1631.7. He was indicted for failure to report for and submit to induction in violation of the Selective Service Act (50 App. U.S.C., Sec. 462). After trial without jury, he was found guilty and sentenced to four years imprisonment. His conviction was affirmed by the Court of Appeals for the Eighth Circuit, which concluded that his accelerated induction as a delinquent was not "lawless or irregular."

Questions Presented

This brief is addressed solely to the question whether the provisions of the Selective Service regulations which give local boards power to reclassify draft registrants and call them up for immediate induction if they fail to perform any duty imposed upon them by the Selective Service Act or the regulations issued thereunder, without providing standards or guidelines as to how that power is to be exercised:

1. Impose a constitutionally forbidden prohibition on exercise of freedom of expression as guaranteed by the First Amendment;

2. Deny procedural rights guaranteed by the Fifth and Sixth Amendments; and

3. Present such opportunities for the operation of discrimination on racial, religious or other impermissible grounds as to constitute a violation of the Due Process Clause of the Fifth Amendment.

Summary of Argument

I. A Selective Service system under which local boards are endowed with unlimited discretionary power to reclassify registrants or to accelerate their call-up on the basis of "delinquency," without providing guidelines or standards as to when that power is to be exercised, imposes a constitutionally forbidden inhibition on exercise of freedom of expression as guaranteed by the First Amendment.

A. There are no statutory provisions governing the operations of the delinquency procedure. The applicable regulations provide that local boards "may" impose the sanctions of reclassification and immediate induction on any delinquent, that is, any person failing to perform a duty connected with the draft. Thus, the boards are free to select arbitrarily those delinquents on whom sanctions are to be imposed.

B. Such broad discretion invites discriminatory application of sanctions against persons expressing unpopular views. The vagueness of the regulations which creates this opportunity is sufficient to invalidate them on their face.

C. In this case, however, there is evidence of discriminatory application. In a letter to local draft board members, the Director of the Selective Service system has encouraged them to apply the delinquency procedures selectively in the case of violations growing out of "demonstrations."

D. The Government's argument that application of the delinquency procedure can only be challenged on the basis

of evidence of discriminatory application by the specific local board in each specific case would place an intolerable and constitutionally impermissible burden on registrants subject to delinquency sanctions. The vice of the present system is that it permits undetectable manipulation of the Selective Service system and the consequence of this is a restrictive effect on freedom of expression on the part of all registrants.

II. The regulations fail to afford the registrants procedural protections guaranteed by the Fifth and Sixth Amendments. The Government's argument that those guarantees do not apply because reclassification and accelerated induction are not "punishment" is unsound. The sole purpose and effect of the delinquency procedures is to deter violation of the Selective Service regulations—the classic purpose of punishment.

III. The vesting in local draft boards of uncontrolled discretion to select among "delinquent" registrants those on whom sanctions are to be imposed presents such opportunities for the operation of discrimination on racial, religious or other impermissible grounds as to constitute a violation of the Due Process Clause of the Fifth Amendment. Inherent in any such system is the danger that it will be administered discriminatorily, in violation of the concept of equal protection of the law which is included in the guarantee of due process.

The delinquency procedures invite discrimination not only on the basis of unpopular views, as argued in Point I, but also on the basis of racial, religious and other prejudice.

It is not necessary to prove discrimination in each case. It is the fact that, because of the absence of standards, discrimination can be practiced without detection or effective judicial supervision that renders the regulations invalid.

ARGUMENT

POINT I

A Selective Service system under which local boards are endowed with unlimited discretionary power to reclassify registrants or to accelerate call-up on the basis of "delinquency," which contains no standards or guidelines as to when that power is to be exercised, imposes a constitutionally forbidden inhibition on exercise of freedom of expression as guaranteed by the First Amendment.

It is one of the lessons of history that an individual's vulnerability to official vendettas is directly dependent upon the breadth of administrative discretion and the availability of procedural safeguards. Obviously, a system which permits selective, arbitrary imposition of penalties without standards, guidelines or safeguards, acts as a Sword of Damocles over those whose political or social views do not conform to the prevailing norms. In the currently popular, but accurately descriptive, constitutional lexicon, such a system imposes an unconstitutional "chilling effect" upon the espousal of unpopular views protected under the free speech guarantees of the First Amendment. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 487 (1965).

This is precisely the vice of the selective service "delinquency" procedures, both on the face of the statute[1] and regulation and as construed and applied in the instant cases. Whether or not reclassification and accelerated inductions are held to constitute "punishment" as such,[2] within the meaning of the Fifth and Sixth Amendments, the breadth of discretion vested in local selective service boards—unfettered by guidelines, definitions, or procedural requirements—is such as to create a constitutionally impermissible threat that protected activity on the part of registrants will trigger the imposition of "delinquency"

1. It should be noted that the Selective Service Act contains only the barest reference to the whole subject of "delinquency." Prior to 1967, it contained no provisions on the subject. In the revision of the Selective Service Act adopted in 1967, the term "delinquents" appeared for the first and only time in Section 456(h)(1), the last sentence of which reads as follows:

> As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Petitioners contend, *inter alia*, that there is no statutory basis for the delinquency regulations. The Government argues, however, that this passing reference to "delinquents" in Section 456(h)(1) provides the necessary basis. This brief is not addressed to that issue. We comment on it only because it strikingly reveals the absence of standards or guidelines of any kind in the controlling statute.

2. It is important to note that the government's argument that the delinquency procedures do not impose "punishment" is relevant to the point next discussed, whether the delinquency procedures violate Fifth and Sixth Amendment guarantees, but it is not relevant to the issue of freedom of expression discussed in this point. If governmental action has a deterrent effect on free expression, its constitutionality is not affected by whether it takes the form of punishment.

Thus, in *Speiser* v. *Randall*, 357 U. S. 513 (1958), a denial of exemption from taxes was treated as placing an unconstitutional restraint on expression. If withholding of exemption from military service is not punishment, neither is withholding of exemption from taxes. Again, in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), this Court found an impermissible restraint on free expression in the operation of a state's civil libel laws, hardly a form of punishment.

sanctions. Such a threat, unnecessary to the achievement of legitimate governmental aims under a properly drawn statute and regulations, cannot help but cast the forbidden "chill." *United States* v. *Jackson*, 390 U. S. 570, 582 (1968).

This danger, it should be noted, applies not only to protests against the Vietnam war but to any expression of views which are unpopular generally or out of favor with particular local boards.

A. The Lack of Standards in the Delinquency Procedures

Since, as we have noted, the governing statutes contain only a passing reference to delinquency, it is obvious that they neither define the term nor supply any standards for the delinquency procedures created by the regulations. The regulations themselves do not supply this omission. They permit a local board to declare a registrant delinquent "whenever a registrant has failed to perform any duty or duties required of him under the Selective Service Law other than the duty to comply with an Order to Report for Induction or the duty to comply with an Order to Report for Civilian Work and Statement of Employer." Thus, presumably local boards are free to, but need not, apply the concept to any violation, however technical, minor or immaterial.[3] Nor does the delinquency regulation provide

3. It has been pointed out that "delinquency" status and consequent punishment can be imposed both on the registrant who returns his Classification Questionnaire on the 11th instead of the 10th day after it was mailed and on the registrant who seeks to evade services by not informing his local board of his whereabouts, or of the termination of the basis for his deferred status (e.g., that his wife's pregnancy entitling him to III-A ended in miscarriage). Griffiths, J., "Punitive Reclassification of Registrants Who Turn in Their Draft Cards," 1 SSLR 4001, 4008 n. 61.

guidance as to the necessity of scienter or willfulness. *Morissette* v. *United States*, 342 U. S. 246 (1952); compare C.F.R. Sec. 1642.4 with Sec. 12(a) of the Act (50 App. U.S.C., Sec. 462(a)) and *Bartchy* v. *United States*, 319 U. S. 484 (1943).

The concept of "delinquency," with its life or death consequences, extends not only to violations of the statute but also to violations of the regulations, which impose requirements upon registrants nowhere found in the statute itself. Congress, under the Government's construction of the delinquency procedure, has not only given local boards total power to construe and apply the delinquency procedures but has also empowered the Selective Service System to promulgate the standards and requirements, violations of which may prompt local boards to impose delinquency sanctions.

Perhaps most important, local boards "may," or may not, choose to visit delinquency sanctions upon violators and may, or may not, remove the violator from delinquency status "at any time," all without any standards or guidelines. This unbridled discretion means not only that some boards may choose to embrace a far broader concept of what constitutes actionable delinquency than others, but that the same board may choose to reclassify and accelerate induction in the case of some delinquents and overlook identical conduct on the part of others.

The opportunity for discriminatory enforcement arises in part from the nature of the local boards and the job they perform. The task of choosing the relatively small number of draftees from among the more than two million young

men reaching draft age each year is vested by the Selective Service system in some 4,000 local draft boards. The possibility that such boards, in the absence of clear legislative standards, will seek to enforce their own political, social and other prejudices through the mechanism of the delinquency procedures cannot be discounted. It is just this kind of opportunity, afforded by vague, overbroad statutes, for the operation of the "whims or personal opinions of a local governing body" that has consistently led this Court to hold such statutes unconstitutional. *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951).

B. The Impact on Freedom of Expression

This Court has repeatedly held that restrictions upon conduct closely touching the exercise of First Amendment rights must be narrowly drawn so as to hit precisely the constitutionally regulable aspects of conduct without permitting impingement upon protected free expression. *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Stromberg* v. *California*, 283 U.S. 359 (1931).

The vesting of unbridled discretion in public officials to grant or deny permission for the exercise of rights of free speech and assembly, in the absence of properly drawn standards calculated to prevent selective, arbitrary administration and to assure uniform application free from improper considerations, has been held unconstitutional as a "pervasive restraint on freedom of discussion" and a "device for the suppression of ideas." *Cox* v. *Louisiana*, 379 U.S. 536, 557 (1965); *Schneider* v. *New Jersey*, 308 U.S. 147 (1939); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Hague* v.

C.I.O., 307 U.S. 496 (1939); *Saia* v. *New York*, 334 U.S. 558 (1948); *Staub* v. *Baxley*, 355 U.S. 313 (1958). The delinquency procedures fail by a wide measure to satisfy the standards of limited discretion exercised within reasonable guidelines as required by these decisions.

It cannot be argued that the thrust of these decisions is limited to laws dealing directly and explicitly with forms of expression, such as leaflets and sound trucks. Any statute or regulation that gives officials discretionary powers defined so broadly that they can be used whimsically is a threat to freedom of expression. As this Court said in *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), "* * * a vague and broad statute lends itself to selective enforcement against unpopular causes."

That consideration was stressed by this Court in *Oestereich* v. *Selective Service Local Board No. 11*, 393 U.S. 233 (1968), in which it barred denial of a statutory exemption from military service on the ground of "delinquency." It said (at 237):

> Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

Whatever may be the merits of the distinction between exemption and deferment as it affects the timing of judicial review or other technical aspects of Selective Service administration, it is clear that, in the terms of the concern expressed in the above-quoted portion of *Oestereich*, the distinction is irrelevant.[4] For the threat that boards, unencumbered by Congressionally prescribed standards, will become "free-wheeling agencies meting our their brand of justice in a vindictive manner" applies as much to deferments and the order of call-up as to exemptions. The danger inheres in the application of delinquency procedures under this statutory and regulatory scheme to any potential inductee, regardless of status. And the effect of such a scheme, as a deterrent to the expression of unpopular views by draft eligibles, is inescapable.

C. The Hershey Letter

We submit that the vagueness of the regulatory scheme and the resultant opportunity for its abuse to restrain protest is enough to condemn it on its face. But here there is more. There is persuasive evidence that the Selective Service system is in fact making use of that opportunity.

It is in this connection that the letter and memorandum sent by General Hershey on October 26, 1967, to all members of the Selective Service system must be considered, for it is a very real fact of Selective Service life. General Hershey is the director of the system, his directive was

4. If anything, there is greater danger of abuse in the case of delinquency procedures affecting classification and induction where there are no guiding standards. Such standards do exist in the case of statutory exemptions. See, for example, the carefully drawn provisions governing exemptions of ministers and students, 50 App. U.S.C., Secs. 456(g) and 456(h)(1).

sent to all boards, it remains unrevoked, and there is evidence in the cases before this Court that it has been acted upon. General Hershey clearly invited local boards to predicate invocation of the delinquency regulations on factors which cannot help but still the voice of protest, and were undoubtedly designed to have precisely that effect.

The letter begins by stating that "deferments are given only when they serve the national interest" and that violation of the Act or regulations "cannot be in the national interest." It then states that those who engage in such violations "should be denied deferment in the national interest."

Two things should be noted at this point. First, this broadly stated policy was laid down by General Hershey, not Congress. Congress has nowhere stated that delinquents should be denied deferment. It has not made any such determination of what General Hershey calls the "national interest."

Second, although the policy is broadly stated ("those who violate them should be denied deferment"), it is obviously not to be broadly applied, in the sense that every violator is to be denied deferment. As is made clear later in the letter, the boards "may" act on the basis of violations but they are not required to do so.

In what cases are they to act? The answer is supplied by the fact that the letter as a whole is addressed to the problem of "demonstrations" and those who engage in them. Granting that it applies only to those who engage in illegal activity, it makes it clear that its concern is with

those who engage in a particular class of illegal activity—those who act under the influence of "misdirected emotions" or "vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens."

What is a draft board member to make of this? He certainly knows that the classic way of condemning opponents of any war a nation may be engaged in—a condemnation freely used during the present conflict in Vietnam—is to describe them as destroying our unity and endangering our freedoms.

The plain import of the letter, then, is that the regulations here involved, which obviously cannot be used against all violators, are to be used against those violators who endanger national "unity."

If this principle were embodied in a formal regulation, its unconstitutionality would be obvious. The vice of the present statute and regulations is that, because of their vagueness, they permit it to be put into effect without being spelled out.

D. The Action of the Local Boards

In its brief in *Oestereich* (Government brief p. 54), the government conceded its doubts as to the validity of the delinquency procedures, particularly in light of the breadth of "unfettered discretion" apparently conferred upon local boards. However, in its brief opposing the grant of certiorari in *Gutknecht* (p. 8), the government attempted to explain away this concession by attributing the con-

stitutional doubts there expressed to the likelihood that Oestereich's local board, "upon the invitation of General Hershey's letter and memorandum discussed above, [did] trigger the operation of the delinquency regulations because of Oestereich's participation in a political protest against the government's involvement in Vietnam."

It is thus apparently the government's position that, if the political stance of a registrant triggers the invoking of delinquency procedures under the board's statutorily "unfettered discretion," then there is a serious constitutional question. Absent such a showing, however, the government urges that no issue of validity arises.

This argument would make each case turn upon the state of mind of each local board in invoking the "delinquency" regulations against each registrant. Unless the registrant could prove that his local board, in exercising its statutorily unfettered discretion in his case, was motivated by General Hershey's letter and memorandum, or by the approach manifested therein whether or not stemming from that source, his challenge would fail.

The government's position, we submit, would place on the registrant an intolerable and constitutionally impermissible burden. Any system which permits and indeed encourages thousands of lay, nonexpert boards to predicate life-or-death consequences upon the exercise of First Amendment rights, and permits redress only upon proof of the board's state of mind, so discourages and impedes the espousal of unpopular views that it cannot be permitted to stand. Particularly is this so when it is recalled, as we

note in Point II below, that the registrant does not enjoy the procedural protections afforded in a judicial trial and required by the Fifth and Sixth Amendments, and a victim of accelerated call-up, such as Gutknecht, receives no administrative hearing at all.

The problem is graphically demonstrated in the instant cases. In *Breen*, as in *Oestereich*, the registrant alleged board reliance upon General Hershey's directive and, in the procedural posture of the case, the truth of the allegation must be assumed. In *Gutknecht*, on the other hand, the trial court found that this directive was not a motivating factor. Yet the registrants' conduct was identical in the two cases.

Were the government's position to be adopted by this Court and thus to become generally known, it would be a simple matter for local boards to mask their hostility to registrants' political or social views and to assert that their application of delinquency procedures to particular youths was unrelated to any expression of such views. Conversely, it would become all but impossible for a registrant to sustain the burden of probing into his board's mental state and ferreting out the forbidden motive.

In sum, the vice lies in the looseness and imprecision of the statutory and regulatory scheme, the breadth of the discretion purportedly given to local boards, and the lack of standards, guidelines and procedural safeguards. Such a scheme permits undetectable manipulation of vital Selective Service classifications and priorities based on constitutionally impermissible criteria; and the consequence of

this is such a "chilling effect" upon the free speech of the youth of our nation that the scheme which allows and encourages it must itself be branded as invalid. As this Court said recently in *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966):

> Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer.

POINT II

The regulations which give local boards unfettered discretion to act against selected registrants fail to afford the registrants procedural protections guaranteed by the Fifth and Sixth Amendments.

The procedures followed under the delinquency regulations make no pretense of complying with the requirements of the Fifth and Sixth Amendments, such as confrontation, compulsory process for obtaining witnesses and the right to counsel. The government's principal justification for this is that the procedures do not impose punishment. We submit that this argument is disingenuous in the extreme. The regulations impose punishment both realistically and in the constitutional sense.

The delinquency procedures accelerate the induction of registrants characterized as "delinquents" primarily by depriving them of "exemptions" or "deferments" to which they are otherwise entitled, because of some wrongdoing

on their part. There is no nexus or connection between the act of wrongdoing and the sanction imposed; the nature of the violation does not establish any relational or functional ineligibility for the classification of which the registrant is deprived. The act of turning in a draft card, for example, does not indicate that the registrant is any less a student, conscientious objector or employee in essential industry. Nor does it mean that he will be a more effective soldier and, therefore, a fit subject for early induction. Under the Selective Service scheme, the ultimate sanction of loss of classification status and accelerated induction may follow upon any delinquency irrespective of its nature or seriousness.

The government's argument that this obviously punitive scheme benefits both the registrant and the Selective Service system is wholly unpersuasive. Essentially the contention is that reclassification and accelerated induction are a lesser sanction to the registrant than immediate criminal prosecution. Even the assumption is debatable—obviously registrants who have risked criminal prosecution to avoid what they regard as immoral military service do not agree with it. Moreover, in view of the broad criminal sweep of Section 12(a) of the Selective Service Act, a registrant who violates some duty under the Act or regulation other than submitting to induction, appears to remain subject to criminal penalties even if he is actually drafted under the delinquency procedures. But, most important, the whole argument is irrelevant. In any system of laws there may be greater or lesser degrees of punishment. That does not mean that the lesser punishment is not, nevertheless, punishment.

Equally specious is the government's argument that military service is a duty of citizenship and thus cannot be regarded as a punitive sanction. This claim cannot be reconciled with the government's own concession in its *Oestereich* brief (p. 52) that "It is difficult to conclude that these statements [by General Hershey] did not in effect invite local Boards to utilize delinquency reclassification in a punitive fashion." The government there correctly acknowledged that accelerated involuntary induction into military service can be the culmination of a "punitive" process. For it is not the nature of the victim's ultimate fate which alone determines whether punishment has been imposed; what may indeed be deemed a duty of citizenship in other contexts can well be the result of a punitive process if, as here, the elements of punishment are present.

Certainly, in assessing the nature of the delinquency procedures, it can hardly be claimed that the consequences visited upon "delinquents" represent an honor or privilege reserved only for this favored group. Obviously, these are sanctions or penalties designed to deprive men of a draft classification or status deemed precious and desirable not only by the registrants themselves but also by those responsible for the formulation and administration of the Selective Service system.

Finally, the invocation of delinquency procedures is not beneficial to the Selective Service system except in one particular sense. As indicated above, there can be no serious claim that delinquents make better soldiers than nondelinquents. What the government really has in mind, but understandably fails to articulate, is that the delinquency regulations, by visiting serious consequences upon

delinquents, discourage young men from violating the Selective Service laws; and this, it may well be urged, is advantageous to the system.

The difficulty with this argument, however, is that it is merely another way of stating the classic deterrence objective of any punishment. And since a deterrence objective is one of the indicia of punishment (*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)), to the extent that the government's argument has any factual basis, it merely serves to confirm the conclusion that draft delinquents must be afforded the vital constitutional protections which the delinquency procedures deny to them.

POINT III

The vesting in local draft boards of uncontrolled discretion to select among registrants who have violated the Selective Service law or regulations those on whom "delinquency" sanctions are to be imposed presents such opportunities for the operation of discrimination on racial, religious or other impermissible grounds as to constitute a violation of the Due Process Clause of the Fifth Amendment.

The possibilities for discriminatory application of the "delinquency procedures" were pointed out by this Court only recently. In *Oestereich, supra* (393 U. S. at 416), Justice Douglas noted that these procedures could be used to induct a registrant in order "* * * (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board member might be better served."

The likelihood of discrimination is strongly suggested by the unrepresentative nature of the local boards. As of 1967, board members were almost exclusively white, their average age was 58 with one-fifth over seventy years of age, and eighty percent had white collar occupations.[5]

The unrepresentative nature of the boards, combined with the fact that only a small proportion of draft eligibles are actually selected for induction, we submit, makes it impossible for the current delinquency procedures to operate in conformity with the requirements of equal protection and due process as embodied in the Due Process Clause of the Fifth Amendment.[6]

Statutes and administrative regulations which create discrimination without a basis rationally connected with a constitutionally permissible purpose have long been held invalid under the concept of equal protection. *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942). The same principle applies if the law, although fair on its face, is indeed administered discriminatorily. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

Inherent in any system which grants to governmental agencies unfettered discrimination to base their decisions regarding individuals on political discrimination, racial or

5. "In Pursuant of Equity, Who Serves When Not All Serve," Report of the National Advisory Commission on Selective Service (1967), p. 19.

6. Although the Fifth Amendment contains no "equal protection" clause, its guarantee of due process has been interpreted to prohibit "unjustifiable discrimination." *Shapiro* v. *Thompson*, 89 S. Ct. 1322 (1969); *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

religious prejudice or personal animus is the danger and indeed the likelihood that it will be administered discriminatorily, in violation of equal protection of the laws. *Niemotko* v. *Maryland*, 340 U. S. 268, 271 (1951), and cases there cited. Thus, in *Smith* v. *Texas*, 311 U. S. 128, 130, 131 (1940), this Court, passing on a claim of racial discrimination in selecting a jury, said:

> Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable.

Similarly, in *Louisiana* v. *United States*, 380 U. S. 145 (1965), this Court struck down a statutory scheme relating to voting which vested undue opportunity for discrimination in local registrars. Said the Court (p. 150):

> The interpretation test, the court [below] found, vested in the voting registrars a virtually uncontrolled discretion as to who should vote and who should not. Under the State's statutes and constitutional provisions, the registrars, without any objective standard to guide them, determine the manner in which the interpretation test is to be given, whether it is to be oral or written, the length and complexity of the sections of the State or Federal Constitution to be understood and interpreted, and what interpretation is to be considered correct. There was ample evidence to support the District Court's finding that registrars in the 21 parishes where the test was found to have been used had exercised their broad powers to deprive otherwise qualified Negro citizens of their right to vote; and that the existence of the test as a hurdle to voter

qualification has in itself deterred and will continue to deter Negroes from attempting to register in Louisiana.

In the cases at bar, the existence of unfeterred discretion in local draft boards to invoke "delinquency" procedures without reference to standards or guidelines of any sort, serves not only as an impediment to the exercise of First Amendent rights, as we have argued in Point I, but as a constant invitation to the operation of racial, religious and other prejudice. The vice is compounded, moreover, by the inability of registrants to secure meaningful judicial review. For effective judicial supervision, in the nature of the case, depends upon articulated standards and criteria against which the administrative conduct and decisions can be measured; and the broader the administrative discretion, the more illusory the review. Where a statutory or administrative scheme presents such opportunities and temptations for discriminatory enforcement—and where as here the likelihood of proving the operation of prejudice in any particular case is slight—the entire scheme should be struck down without the necessity of establishing the operation of impermissible discrimination in any individual case.

It may be argued that in many of the cases cited above, for example, *Smith* v. *Texas* and *Louisiana* v. *United States*, there was evidence that discrimination had in fact occurred. We believe there is similar evidence of discrimination here. The Hershey letter referred to above plainly establishes a policy for local draft boards that the delinquency regulations, technically applicable to all violators, are to be invoked selectively in the case of those who engage in "dem-

onstrations" or who are motivated by a desire to undermine national "unity."

However, we submit that such proof of discrimination is not necessary. The essence of the principle that public officials may not be given unlimited power to make decisions affecting the rights of individuals is the potentiality of abuse, not its actuality in each case. Thus, in the *Smith* and *Louisiana* cases, *supra*, the discrimination was referred to as evidence for the wisdom of the rule barring unregulated official power. This Court's decision in the *Louisiana* case is plainly posited on the absence of standards rather than on evidence of discrimination.

A parallel may be drawn with the cases invalidating ordinances that give police officials unlimited power to permit various forms of expression. Thus, in *Saia* v. *New York*, 334 U.S. 558 (1948), this Court invalidated an ordinance giving local officials unlimited power to permit or prohibit the use of sound trucks. Recognizing that the state may properly protect its citizens against noise resulting from the unregulated use of these devices, the Court struck down the ordinance because the Chief of Police could grant or deny permits on any basis he chose. The Court said (at 562):

> In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying.[7]

7. Similarly, in *Kunz* v. *New York*, 340 U. S. 290 (1951), this Court held that an ordinance barring public worship meetings unless a permit had been obtained was unconstitutional because no standards were supplied for the granting or withholding of the permit. This result was reached not because the denial of the permit in question was discriminatory but because, under the ordinance, it could have been.

It is thus apparent that it was the opportunity for, not the actuality of, discrimination based on political or religious belief that required invalidation of the regulation. So here, the opportunity for discriminatory application of the delinquency regulations is enough to require their invalidation.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decisions of the Courts of Appeals in these two cases should be reversed.

Respectfully submitted,

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